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Supreme Court of the United States

OCTOBER TERM, 1946.

No. 689.

FREEMAN J. THOMSON, ADMINISTRATOR OF THE ESTATE OF ARTHUR W. THOMSON, DECEASED, PETITIONER,

VS.

CAROLINE THOMSON, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

HARVEY E. HARTZ,
MARTIN J. O'DONNELL,
Attorneys for Petitioner.

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SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

A.

The United States Circuit Court of Appeals for the Eighth Circuit reversed a judgment of the United States District Court at Kansas City in favor of Petitioner in

an interpleader proceeding against the parties hereto instituted by John Hancock Mutual Life Insurance Company.

Caroline Thomson and Arthur Thomson were married on July 17, 1930 (22). About June 15, 1938, the district manager of said Insurance Company called at their home, interviewed both. He called their attention to various types of life insurance contracts (65), Mr. and Mrs. Thomson participating in the discussion.

Mr. Niman, as a witness for Mrs. Thomson, testified that: "During the course of the interview they decided to buy the contract." During the interview the district manager asked a question contained in the application for insurance:

> "Do you want to reserve the right to change the beneficiary?"

and the answer given was

> "Yes" (71).

The district manager, wrote into the application the answer "Yes" (71).

When the policy was issued, it was issued with that provision in it (71). The insurance company promised that on the death of the insured, subject to the conditions and provisions thereof, and while it was in force, it would pay the sum of $20,000 to

> "Caroline Thomson, wife, if living, or to such other beneficiary as may be finally substituted under the conditions hereof or if no such beneficiary be then living then to the executors or administrators of the insured."

The policy also provided:

> "Change of Beneficiary. If the right has been reserved, the Insured, unless there be an existing

assignment of this policy, may change the beneficiary from time to time by written request upon the blanks of the Company filed at its Home Office, but such change shall take effect only upon endorsement hereon."

On February 12, 1940, the following endorsements were made on said policy:

"This certifies that on February 3, 1940, The Estate of the Insured was nominated as revocable beneficiary under this Policy, subject to all its provisions, and subject also to any existing pledge or assignment thereof.

John Hancock Mutual Life Insurance Company,
By Charles J. Diman,
Secretary.

Dated at Boston, Mass. February 12, 1940." Stamped across the above endorsement "SEE SUBSEQUENT ENDORSEMENT."

"The Assignor by an absolute assignment dated Feb. 5, 1940, revokes any nomination of beneficiary heretofore made and any method of optional settlement heretofore elected under this policy.

John Hancock Mutual Life Insurance Company,
By Charles J. Diman,
Secretary.

Dated at Boston, Mass. Feb. 12, 1940."

The policy contained the following recital:

"Policy and Application the Entire Contract — This policy and the application therefor constitute the entire contract between the parties * * *

dated at Boston, Massachusetts, this Fifteenth day of JUNE, 1938. * * *."

The district manager further testified that Arthur Thomson, the deceased husband, stated that he wanted his wife named as beneficiary so that she could be paid for services rendered in connection with his business, and that this statement was made during the interview in which Arthur Thomson, in his wife's presence, informed the district manager that he desired to reserve the right to change the beneficiary.

Mrs. Thomson was herself a party to the insurance contract and bound by its provisions, and especially by the provision reserving the right to Mr. Thomson to change the beneficiary. The district manager for the insurance company, Niman, testified to facts showing that both Mr. and Mrs. Thomson were parties to the insurance contract and bound by all of its provisions and that she consented to the inclusion of the reservation of the right in the policy reserving the right to Mr. Thomson to change the beneficiary.

Mrs. Thomson was also present when the policy was delivered by the district manager (67), for the insurance company, who also testified that the contract was actually made with both Mr. and Mrs. Thomson, as follows (65):

> "A. The agent had made an appointment for me to call on Mr. and Mrs. Thomson. I called upon them at their apartment at the Berkshire Hotel and discussed with them various types of contracts, and the merits of the contracts, and so forth, and Mr. Thomson decided that he was interested in the twenty year endowment contract and he discussed the twenty year endowment contract with his wife, who was present at the time, and between them they decided that that is the type of a contract they were going to buy if they bought, and during the course of the interview they decided to buy the contract, * * *"(65).

Mr. Thomson, according to the district manager, called on him about February 3, 1940, to make arrangements for a loan and to use the policy as security. The district manager then told deceased that his wife must consent. The husband, according to the district manager, suggested that he did not want her to know anything of the matter, and thereupon the district manager advised deceased that he must change the beneficiary, and name his estate as beneficiary, thereby revoking the nomination of his wife as beneficiary (70) on the forms provided by the Insurance Company.

In accordance with these suggestions the change of beneficiary was made. The policy was assigned to the Mercantile Bank as security for a loan.

On June 26, 1944, marital differences having arisen between them (129, 74), the Thomsons went to the office of an attorney in Illinois and employed him to file a divorce action and prepare a property settlement. The property settlement contract contained the following (15):

> "That the parties hereto hereby agree that each of them is hereby wholly and forever barred of and from all rights, claims and demands in and to the property of each other, real, personal or mixed, wheresoever situated, and whether now possessed by the said parties or hereafter acquired by them, including the rights of dower and homestead."

A decree of divorce was granted on August 1, 1944, the decree embodying the terms of the property settlement, which decree contained the following recital (17):

> "* * * and that said parties be and each of them is hereby wholly and forever barred from all right, claim or demand in and to the property of each other, real, personal or mixed, wheresoever situated, * * *."

Petitioner's interplea relied on said property settlement and said decree of divorce adjudicating the parties' property rights as *res judicata* (14-17).

Mr. Thomson thereafter died on December 4, 1944, while indebted to the Bank for the sum of $5,746.84.

On May 2, 1945, the Insurance Company filed its interpleader petition in the United States District Court for the Western District of Missouri at Kansas City.

On May 21, 1945, petitioner filed his answer and interplea (7-17). Caroline Thomson, on August 13, 1945, filed her first amended answer and interplea (18-20). On September 26, 1945, petitioner filed his reply (20).

The cause was tried before the Hon. Albert A. Ridge, District Judge, on October 24, 1945, and on November 15, 1945, the court rendered a decree sustaining the interpleaders complaint and later finding the issues for petitioner, made findings of fact (22-24) and conclusions of law (24-26), and on December 15, 1945, rendered judgment in favor of petitioner for the balance due on the Policy, $14,951.50.

At the trial petitioner's counsel stated (35):

> "Mr. Hartz: Then if your Honor please, this policy is, I presume, in evidence, it is part of the petition and will be considered in evidence.
>
> The Court: It will be so considered."

The following recital is found on page 120 of the record:

> "It is hereby stipulated and agreed that the foregoing is a full, true and complete transcript of the record and proceedings in the cause of *John Hancock Mutual Life Insurance Company, a corporation*, v. *Caroline Thomson, and Freeman J. Thomson, administrator*, No. 3189, and the same is hereby approved.

Approved this 15th day of March, 1946.
Harry A. Hall,
Attorney for Appellant.
Harvey E. Hartz,
Attorney for (Respondent)."

The certificate of the Clerk of the District Court is to the same effect. But the contract or policy of insurance to which Mrs. Thomson was a party and on which she relied as a basis of her claim is not included in the record.

The complaint filed by the John Hancock Mutual Life Insurance Company alleges (3):

> "That said original policy is filed herewith, marked 'Exhibit A' and made a part hereof."

That "Exhibit A" is nowhere shown in the record, but on page 5 are the words "(Policy Exhibit 1)," which is evidently substituted for "Exhibit A."

Included in the instrument described as "Policy Exhibit 1" are asterisks, and some of the provisions of the policy which asterisks establish omissions from the contract (Webster's Int. Dictionary).

B.

STATEMENT AS TO JURISDICTION.

Mrs. Caroline Thomson filed her notice of appeal in the District Court on January 22, 1946 (27), and on July 26, 1946, the Circuit Court of Appeals rendered the judgment (135-136) reversing the judgment of the District Court with costs, which judgment also contained the following provision (136):

> "And it is further ordered by this Court that this cause be, and the same is hereby, remanded to the said District Court with directions to enter judg-

ment in favor of Caroline Thomson for the proceeds of the policy deposited in Court by the John Hancock Mutual Life Insurance Company.

July 26, 1946."

A petition for rehearing was filed in accordance with the rule of the Circuit Court of Appeals, and was overruled on September 3, 1946.

The opinion of the United States Circuit Court of Appeals for the 8th Circuit is reported in 156 F. 2d 581, and at pages 125-135 of the Record.

The statutory provision which is believed to sustain the jurisdiction of this Court is the following: Sec. 347, 28 U. S. C. A., providing:

> "(a) In any case, civil or criminal, in a circuit court of appeals * * * it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal" (Which said statute in its present form was adopted February 13, 1925, 43 Stat. 938).

The judgments of the District Court were judgments which rested for their foundation upon the contract of insurance involved. It was embodied in and was a part of the alleged but non existing contract between Mrs. Thomson and her deceased husband. The burden was upon Mrs. Thomson, as appellant, to include the entire contract of insurance in the record in the Circuit Court of Appeals if she desired to have said Circuit Court try the case *de novo* or to review the evidence in the case with reference to said contract and to reverse the District Court judgment and direct the entry of a judgment for Mrs. Thomson.

The decision of the Circuit Court of Appeals is, therefore, in conflict with the decision of this Court in *Red River Cattle Company of Texas* v. *Alfred Sully*, 144 U. S. 209. It is also in conflict with the decision of another Circuit Court of Appeals, to-wit: that of the Circuit Court of Appeals of the District of Columbia in *Berger* v. *Smith*, 32 F. 2d 423, Certiorari Denied 280 U. S. 557, holding that unless the instrument on which the judgment of the trial court was based is included in the record, the appellate court is without jurisdiction to do otherwise than affirm the judgment.

The decision of the Court of Appeals is also in conflict with the decision of this Court in *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, requiring the Federal courts, in diversity of citizenship cases, to apply the law of the State in which the federal court sits: *Guaranty Trust Co.* v. *York*, 326 U. S. 99. And in the case at bar, the right to change the beneficiary in the insurance policy, reserved by petitioner as a part of the alleged agreement with Mrs. Thomson, was a property right under the law (*Grigsby* v. *Russell*, 222 U. S. 149; *McKinney* v. *Ins. Co.*, 270 Mo. l. c. 315).

That right was adjudicated and determined against Mrs. Thomson by the decision of the Illinois divorce court shown in the record (14-17), to which decision the District Court was compelled to give *res judicata* effect under the decision of the Missouri appellate court in *Paper Products Co.* v. *Life Insurance Co.*, 204 Mo. App. 527, and under the full faith and credit clause provision of the United States Constitution, and under the decisions of this Court in *Russell* v. *Place*, 4 Otto 606, and *De Sollar* v. *Hanscome*, 158 U. S. 216.

This Court has jurisdiction to review this case on certiorari for the reason that the facts and the law authorize this Court to review same in the exercise of its

sound judicial discretion; and the reasons for review, as shown by the record, are special and important; and the record herein discloses that clauses (a) and (b) of Paragraph 5 of Rule 38 are directly applicable to the questions here involved and justify a review.

The decision herein is in conflict with the decisions of the ten circuits on the questions here involved, which questions here involved are of such importance that it is in the public interest to have them decided by this Court under the rule stated by Chief Justice Taft in *Magnum* v. *Coty*, 262 U. S. 159:

> "The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes, first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort."

C.

THE QUESTIONS PRESENTED HEREIN ARE:

A.

Whether or not a Circuit Court of Appeals has jurisdiction to reverse a judgment of a District Court, and thereupon to try the case *de novo* on the record before it when it affirmatively appears from the record that an instrument or contract which is the basis of the litigation, and the basis of the judgment of the District Court, is not included in the record in the Circuit Court of Appeals.

B.

Whether or not a Circuit Court of Appeals may reverse a judgment of the District Court and render a new judgment in favor of the losing party in the District Court,

when the evidence which was before the District Court is not included in the record before the Circuit Court of Appeals.

C.

Whether or not the agreement of a beneficiary in an insurance policy that the insured shall have the right to change the beneficiary can be excluded by the Circuit Court of Appeals from its consideration on appeal, and ignored by it in its decision when it makes a finding that the insured made a contract with the beneficiary not to change the beneficiary, notwithstanding the very policy which both parties agreed should be the policy which the Insurance Company should issue after some two hours' discussion and consideration thereof, and thus and thereby deprive the petitioner of that which was the property of the insured, to-wit: his right to change the beneficiary in an insurance policy which he owned, notwithstanding a decree of a court having jurisdiction forever barred any claim by Mrs. Thomson to any property or property right of her deceased husband.

D.

Whether or not a judgment rendered by a District Judge, after a trial between claimants to the balance due on an insurance policy in an interpleader proceeding wherein the only relief sought by the contesting parties is an award of the balance of the insurance money deposited with the Clerk, and wherein the issues rest upon oral testimony of witnesses who testified in the presence of the District Judge, may be reversed by a Circuit Court of Appeals, which Circuit Court of Appeals did not have the advantage of seeing and hearing the witnesses testify.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

The Circuit Court of Appeals was without jurisdiction to reverse the decision of the District Court for the reason that respondent Caroline Thomson, as appellant in the Circuit Court of Appeals, failed to include the policy of insurance on which the action was founded in the transcript of the record presented to that court. The decision of the Circuit Court of Appeals is therefore in conflict with the decision of this Court in *Red River Cattle Company of Texas, plaintiff in error, against Alfred Sully*, 144 U. S. 209, wherein this Court said:

> "The Chief Justice: The only errors assigned which might call for consideration depend upon the terms and the construction of a contract which does not appear in the record.
>
> *The judgment is therefore affirmed*" (Italics Court's).

II.

The decision and opinion of the Circuit Court of Appeals is in conflict with the decision and opinion of the United States Circuit Court of Appeals for the District of Columbia in *Berger* v. *Smith*, 32 F. 2d 423, Certiorari Denied by this Court in 280 U. S. 557, holding that where the instrument which is the basis of the action is not included in the record, it cannot be considered.

III.

The Circuit Court of Appeals was without jurisdiction to try the case *de novo* and to reverse the judgment of the District Court and to direct the District Court to enter a judgment for Caroline Thomson, since it appeared from the face of the record before it that all of the evidence adduced before the trial judge was not included in the transcript of the record before the Circuit Court of Appeals, and the decision and opinion of the Circuit Court of Appeals is therefore in conflict with the many decisions of this Court, and the courts of all the other circuits, and the general law on said subject.

Blease v. *Garlington*, 92 U. S. 1.

IV.

The decision of the Circuit Court of Appeals holding that the District Court erred in failing to find the issues for Mrs. Thomson is in conflict with the decisions of the Courts of the State of Missouri, and of this Court and the other circuit courts of appeal, in holding that Mrs. Thomson had a contract with Arthur Thomson, her husband, by virtue of which he bound himself to keep the insurance in force, notwithstanding it appears that Mrs. Thomson agreed, as a part of the alleged agreement that Mr. Thomson should reserve the right to change the beneficiary in the policy, and that Mr. Thomson exercised the right so given to him by the terms of the policy, and to which right to change Mrs. Thomson agreed at the time both parties agreed to accept said policy with said provision written therein, and at the time Mr. Thomson was alleged to have made the statements on which the Court of Appeals based its judgment.

V.

The Circuit Court of Appeals overlooked the fact that the jurisdiction of the District Court was based alone on diversity of citizenship, and that for said reason the District Court was merely another court of the State, under the decision of this Court in *Guaranty Trust Company* v. *York,* 326 U. S. 99, and that the decision of the District Court was in accordance with the law of the State of Missouri, and that the decision of the Court of Appeals is in conflict with the law of the State of Missouri on the question, as expressed in the opinion of the Missouri appellate court in *Kinney* v. *Insurance Company,* 270 Mo. 305, l. c. 315, and *Dunavant* v. *Mountain States Life Insurance Company,* 67 S. W. 2d 785, and therefore in conflict with the decision of this Court in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64.

VI.

The evidence offered by Mrs. Thomson, by her witness the district manager, disclosed her agreement, at the time the contract of insurance was made, that her alleged contract with deceased embodied the agreement that Mr. Thomson should have the right to change the beneficiary, and that said provision, with her knowledge and consent, was written into the policy therein issued to Mr. Thomson. Said right of Mr. Thomson to change the beneficiary was a property right, which property right was included in and was amongst the rights of property referred to in the property settlement and in the decree of divorce. The decision and opinion of the Court of Appeals is therefore in conflict with the decision of the Missouri appellate court in *Paper Products Company* v. *Life Insurance Company,* 204 Mo. App. 527, and the decisions of this Court in *Russell* v. *Place,* 4 Otto 606, and *De Sollar* v. *Hanscome,* 158 U. S. 216.

VII.

The opinion of the Circuit Court of Appeals is in conflict with the general law on the question stated in Sec. 1724 of 4 C. J., as follows:

> "(Sec. 1724) (4) Instrument Sued on or Involved. If the instrument sued on is to be examined by the court on appeal, it must be made a part of the record by a bill of exceptions, or in some other legitimate way; otherwise it cannot be considered, and it is not made a part of the record by the clerk's recital of it, or by being indorsed on the declaration, although where actions are brought under certain statutory provisions such instrument becomes part of the pleading. But papers do not become a part of the record by being filed with the pleadings, in conformity with a statutory provision which does not make them a part thereof. Simple profert of an instrument, without oyer, does not make it a part of the record. But when oyer of the instrument is given it becomes part of the pleading; and if profert is in fact, although unnecessarily, made, and oyer craved and given, the instrument becomes a part of the record.
>
> "Presumption in favor of judgment. If the instrument which is the foundation of the action is not so incorporated, every reasonable intendment must be indulged in favor of the judgment of the court being in accordance with its terms." *Greco* v. *Haff*, 63 F. 2d 863.

VIII.

Mrs. Thomson was a party to the contract and bound by its terms, including the provision giving Mr. Thomson the right to change the beneficiary; and consequently, whatever right Mrs. Thomson might have was a right subject to the terms of the contract of insurance to which she was a party.

The decision of the Circuit Court of Appeals is, therefore, in conflict with the decision of the Supreme Court of Missouri in *McKinney* v. *Insurance Company*, 270 Mo. 305, l. c. 315, where the court decided that "a contract provision which entitled the insured to change the beneficiary" in an insurance policy "is as broad as its terms and no broader, and hence it must be construed according to the terms and stipulations expressing it in a given case." And further held that "the power to exercise it is measured by the language on which it is founded," and that whether that right "arises by convention or from the nature of the insurance, the beneficiary to be affected by its exercise has a conditional interest only in the policy proceeds, while the power to change such beneficiary continues to exist."

IX.

The decision of the Circuit Court of Appeals is in conflict with the decision in *Caffery* v. *John Hancock Mutual Life Insurance Company*, 27 Fed. 25, l. c. 28, holding that "the beneficiary is bound by the contract entered into between the insured and the company."

X.

The decision of the Circuit Court of Appeals is in conflict with the opinion of this Court in *Bank* v. *Hall*, 101 U. S. 43, and in conflict with *Equitable Life Ins. Co.* v. *McElroy*, 83 Fed. 638 (C. C. A. 8), where Sanborn, J., said:

> "The subject matter of a policy of insurance is the life insured. The parties to it are the insurance company, on the one hand, and the beneficiaries on the other. The parties to a contract are as important as the subject matter and parties cannot be imported

or substituted upon one side of a contract without the consent of those on the other. *Bank* v. *Hall*, 101 U. S. 43, 51."

XI.

The judgment of the District Judge was based upon the oral evidence of witnesses and the insurance policy which was the basis of the litigation. The only issue to be determined between the parties hereto was who was entitled to a judgment for the balance due on the insurance policy, the proceeds of which were deposited with the Clerk of the District Court. The judgment of the District Judge was supported by substantial evidence, part of which was oral, and was binding on the Circuit Court of Appeals, which court was without jurisdiction to try the case *de novo*, especially since all the evidence before the District Judge was not before the Court of Appeals.

XII.

The stipulation at page 120 should have been construed by the Circuit Court of Appeals with reference to its subject-matter and in the light of the surrounding circumstances, including the facts appearing in the transcript of the record, which record shows that the insurance contract, which was the basis of the litigation and part of the alleged contract on which Mrs. Thomson based her claim for relief—and so construed, it is apparent that said stipulation was based on mistake, or inadvertence, and the Court of Appeals should have found and disregarded said stipulation, which was, as shown by the record, untrue and the parties could not by a stipulation give the Circuit Court of Appeals jurisdiction not conferred on it by Section 225, Title 28, U. S. C. A., which was wholly appellate.

CONCLUSION.

Wherefore, your petitioner prays that a writ of certiorari under the seal of this court, directed to the United States Circuit Court of Appeals for the 8th Judicial Circuit commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said United States Circuit Court of Appeals for the 8th Circuit and of the case numbered and entitled on its docket No. 13330 Civil, *Caroline Thomson, Appellant,* v. *Freeman J. Thomson, Administrator of the Estate of Arthur W. Thomson, Appellee,* to the end that the cause may be reviewed and determined by this court as provided for by the statutes of the United States, and that the judgment of the United States Circuit Court of Appeals for the 8th Circuit be reversed by this court, and for such further relief as to this court may seem proper.

Dated November 7th, 1946.

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MARTIN J. O'DONNELL,
Attorneys for Petitioner.